FILE COPY

Supreme Court, U. S.
FILED
JUN 1 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

1971 TERM

DOCKET NO. 71-1563

ANGELO DECARLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL P. DIRENZO
15 Columbus Circle
New York, N. Y. 10023

MORDECAI M. MERKER
7206 Regent Drive
Alexandria, Va. 22307

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction of the Supreme Court	2
The certified record	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	4
Reasons for granting the writ	7
1. The decision below conflicts with the decision of the Court of Appeals for the First Circuit with regard to the service of interrogatories upon the jurors	7
2. The decision below is sufficiently important for the Supreme Court to review because the deliberate misconduct of the prosecutor, which was allowed by the trial court and sanctioned by the decision below, has raised important questions of constitutional law which should be settled by this Court	13
3. The decision below is exceptionally important for the Supreme Court to review, because it provides an opportunity for the Court to settle important questions of constitutional law which concern standards of proper conduct for trial judges and prosecutors	17
Conclusion	21
Appendixes	1a
A. A photo copy of one of the twelve Interrogatory forms served upon the twelve jurors	1a
B. Copy of the unanimous opinion by Circuit Judge Aldisert for the three-judge panel of the Court of Appeals below filed August 6, 1971, reversing the judgment of conviction	3a

Page

C. Copy of the Court of Appeals order allowing a rehearing *en banc* 17a

D. Copies of opinion of the Court of Appeals *en banc* affirming the judgment of conviction, concurring opinion, and two dissenting opinions filed April 4, 1972 ..... 18a

E. Judgment of the Court of Appeals *en banc* filed April 4, 1972 ..... 49a

F. Summary of the prejudicial publicity contained in The Newark Evening News, The Newark Star-Ledger, and The New York Times during the trial 50a

G. Constitutional and Statutory Provisions Involved 59a

CITATIONS

CASES:

Berger v. *United States*, 295 U.S. 78 (1935) 16

Bollenbach v. *United States*, 326 U.S. 607 (1946) 15, 16

Illinois v. *Allen*, 397 U.S. 337, reh. den. 398 U.S. 915 (1970) 17, 18

Pamplin v. *Mason*, 364 F.2d 1 (5th Cir., 1966) 20

United States v. *Spock*, 416 F.2d 165 (1st Cir., 1969) 7, 11, 12

STATUTES:

18 U.S.C. sec. 892, 894 6

18 U.S.C. sec. 3231 4

RULES:

Federal Rules of Criminal Procedure 10

MISCELLANEOUS:

Conduct of counsel for the prosecution, 23A C.J.S. Crim. Law sec. 1081 17

Verdicts in federal criminal cases, 8 Moore's Federal Practice, Par. 31.02 [3] (1972) 12

IN THE

Supreme Court of the United States

1971 TERM

DOCKET NO.

ANGELO DECARLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Angelo DeCarlo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit *en banc* entered in this proceeding on April 4, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals *en banc*, not yet reported, which affirmed the judgment of conviction, appears in Appendix D hereto. This is the opinion which is sought to be reviewed.

The opinion of the three-judge panel, not yet reported, which originally decided the case on appeal and unanimously reversed the judgment of conviction, appears in Appendix B hereto.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Third Circuit was entered on April 4, 1972 after a rehearing *en banc*. Upon the petitioner's application for an extension of time to file a petition for writ of certiorari, Mr. Justice Brennan, on April 28, 1972, ordered that the time for filing a petition for writ of certiorari is extended to and including June 3, 1972, and this petition for certiorari was filed within the extended time. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254 (1).

THE CERTIFIED RECORD

Mr. Daniel Cecere was a party to the proceeding in the court below and a co-defendant at the trial in the United States District Court for the District of New Jersey. He has filed a separate petition for writ of certiorari (Supreme Court Docket No. 71-1438). We have been advised by the Clerk of the Court of Appeals for the Third Circuit that counsel for Mr. Cecere has requested that the certified record of the proceedings of the United States District Court be filed in the Supreme Court.

QUESTIONS PRESENTED

1. The trial judge served interrogatories upon the jurors to take into the jury room and His Honor made it clear as to what answer he expected the jurors to give. Were not the service of interrogatories upon the jurors and the trial judge's instructions and comments

with regard thereto improper and coercive, and a deprivation of the petitioner's constitutional right to due process and trial by jury?

2. The prosecutor introduced evidence of the circumstances of the death of a prospective witness. Did not the introduction of such highly prejudicial evidence deprive the petitioner of his constitutional right to a fair trial?

3. Was not the petitioner deprived of his constitutional right to the effective assistance of counsel by the personal attacks conducted by the trial judge and the prosecutor upon the attorneys for the defense during the trial?

4. Did not the trial judge stir up public sentiment against the petitioner and all attorneys for the defense, and thus deprive the petitioner of his constitutional right to due process and the effective assistance of counsel, when the trial judge released to the press sensational transcripts of electronic eavesdropping conducted by the Government, causing an avalanche of unfavorable publicity which saturated the community during the trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth verbatim in Appendix G. The citations are as follows:

Fifth and Sixth Amendments to the Constitution of the United States;

18 U.S.C. sec. 2

18 U.S.C. secs. 891, 892, 894

STATEMENT OF THE CASE

This is a federal criminal case. The jurisdiction of the United States District Court is based on 18 U.S.C. sec. 3231.

The petitioner and Daniel Cecere were partners in an arbitrage operation with Gerald Martin Zelmanowitz, who was the Government's principal witness, Louis B. Saperstein, who died prior to the indictment, and Joseph Polverino, who was indicted with the petitioner but was granted a severance.

The Government built its prosecution on the testimony of Zelmanowitz, a man with a background of forgery, larceny, fraud and deception, and several criminal charges pending against him in the state and federal courts (458-558).

Zelmanowitz was a trader in arbitrage. He bought foreign securities overseas and sold them simultaneously in the United States. In late summer of 1967, Zelmanowitz entered into partnership with Saperstein. They opened a "numbered" Swiss bank account and they made their first trade by buying and selling 500 shares of Royal Dutch Petroleum (186-200, 319). Saperstein was enthusiastic about the arbitrage operation. He recognized that with additional funds they could trade in greater blocks of stock and earn more profits.

Saperstein took Zelmanowitz to meet the petitioner DeCarlo. They explained the mechanics of arbitrage to DeCarlo, and they asked DeCarlo for a loan of $100,000. DeCarlo referred them to Cecere (200-206).

Thereafter, Saperstein and Zelmanowitz met with Cecere and explained to him the mechanics of arbitrage. Saperstein asked for $100,000, but Cecere wished to

become a partner in the arbitrage instead of lending the money (262-266). A new partnership was set up. Cecere, DeCarlo, and Polverino would put $100,000 into it, in addition to a $50,000 loan which had previously been made to Saperstein. Saperstein would repay the loan and put the money into the partnership. The books would be wiped clean. The loan would no longer be outstanding and the interest would no longer be due. Thus the total investment would be $150,000. Saperstein and Zelmanowitz would receive 50% of the profits and the defendants Cecere, DeCarlo, and Polverino would receive 50% (266-267).

Between October 24, 1967 and January 1, 1968, the partnership earned about $85,000 in sixteen trading days (281). The arbitrage operation ended when certain required documentation was refused by the Internal Revenue Service (292-293).

Saperstein took $55,000 from the partnership which he embezzled for his own use. He thereafter withdrew an additional $40,000 with Zelmanowitz's permission, but without the knowledge of DeCarlo and Cecere (317, 347-348, 588-597).

The entire arbitrage operation occurred prior to May 29, 1968, the date of enactment of the law upon which the defendants were indicted, and prior to the dates alleged in the indictment, except that the Swiss bank account was not closed out until September, 1968 (371-373).

Zelmanowitz testified that on September 13, 1968, Saperstein was beaten by Cecere and Polverino in a room at the rear of a restaurant in New Jersey, but DeCarlo arrived, stopped the beating, rebuked Cecere and Polverino for administering the beating, and told

Saperstein to pay back the full amount that he owed within three months.

The prosecutor's proof of credit transactions is composed of hearsay admissions attributed to the defendants (286-287, 340-342, 352-353, 357-359, 368-370) and hearsay attributed to Saperstein to show his state of mind (299-300, 317, 342-343, 344-346, 346-349, 353-355, 1213, 1771-1775).

The petitioner and Daniel Cecere were convicted by a jury in the United States District Court for the District of New Jersey on three substantive counts and three conspiracy counts charging extortionate extensions of credit and the use of extortionate means to collect or attempt to collect the debts under 18 U.S.C. sec. 892, 894.

The petitioner and Cecere were each sentenced to a prison term of twelve years and a fine of $20,000, and they appealed. A three-judge panel of the Court of Appeals unanimously reversed the convictions and granted a new trial. (Appendix B). The reason for the reversal was that the introduction by the prosecutor of evidence as to the cause of Saperstein's death constituted incurably prejudicial error. The Government then petitioned for a rehearing with a suggestion for a rehearing *en banc*. The Court of Appeals ordered a rehearing *en banc*, and the Court *en banc* affirmed the judgment of conviction in an opinion in which six Circuit Judges concurred. Chief Judge Seitz filed a separate concurring opinion. Two dissenting opinions were filed by Circuit Judges Kalodner and Aldisert. (Appendix D).

The petitioner continues to be incarcerated in prison pending appeal.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT WITH REGARD TO THE SERVICE OF INTERROGATORIES UPON THE JURORS. IT IS ALSO SUFFICIENTLY IMPORTANT FOR THE SUPREME COURT TO REVIEW THE DECISION BELOW, BECAUSE THE TRIAL JUDGE, BY SERVING INTERROGATORIES UPON THE JURORS AND BY HIS INSTRUCTIONS AND COMMENTS WITH REGARD THERETO, HAS RAISED IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The decision of the Court of Appeals for the First Circuit which is contra to the decision below is *United States* v. *Spock*, 416 F.2d 165 (1969).

The Hearsay Statement to the FBI

An important "witness" in this case is Louis B. Saperstein, a 63-year-old man who died on November 26, 1968 (388-390, 1013), prior to the indictment. He "testified" by way of a letter which he had written to the Federal Bureau of Investigation, part of which the trial judge admitted in evidence for the purpose of showing Saperstein's state of mind. The part of the letter which was read to the jury, however, went beyond Saperstein's state of mind and was an accusation against the petitioner. This letter was read to the jury over the strenuous objections of counsel for the petitioner (712-713, 1048-1066, 1071-1075, 1168-1193, 1209-1213, 1251-1255).

The Limitation on the Use of the Statement

The trial judge's charge to the jury with regard to Saperstein's statements, written and oral, was lengthy (1855-1861). To this charge, an exception was taken (1882-1884). These excerpts from the court's charge indicate the limitation the court attempted to

apply: "You may look to the statements of Mr. Saperstein as to his state of mind, * * *. * * * No act on the part of either of the defendants can be established from the contents of Mr. Saperstein's letter to the Federal Bureau of Investigation or from any of his other statements." But the trial judge's own recognition of the inferences which the jury could normally and logically draw from Saperstein's letter to the FBI shows its clearly prejudicial effect (1859-1860):

> "Now, I want to take as an example the letter written to the Federal Bureau of Investigation. There are statements of fact in that letter which you are not to consider as true either in whole or in part. You are not to consider them for any purpose whatsoever. There is a recital by Mr. Saperstein that he was beaten. That statement is not proof of the fact. If he was, you must look to other evidence, not to this letter. There is also a statement in this letter as to the conditions that were imposed for repayment of money. You are not to consider that as proof of his indebtedness or of the fact that repayment was demanded or the conditions thereof. There is also a statement in this letter that there was a phone call to Mr. DeCarlo with a reference to what Mr. DeCarlo's reaction was. There, too, you cannot consider those statements for the truth of them either in whole or in part. The letter was introduced solely for the purpose of permitting you to infer that Louis B. Saperstein was in a state of fear."

Did the trial judge's charge to the jury overcome the fact that in addition to his state of mind, Saperstein was permitted to "testify" against the petitioner with regard to the matters contained in the letter, without cross-examination?

The Jury Was Served With Interrogatories

Even the trial judge was not sure about the jury being able to follow his own charge. His Honor submitted interrogatories to each juror on this point. The procedure, instructions, and comments were highly coercive, and an exception was taken (1886-1887). As to the interrogatories, the trial judge gave this charge to the jury (1862-1864):

> ". . * * * Now, with respect to this matter of hearsay testimony, I am going to ask you to do something before you render your verdict. I have a statement, here, which is to be completed and to be the individual statement of each juror. It reads: 'We, each speaking individually,' and then there is a line and under that I have 'did' or 'did not' and you will write the appropriate word above that. 'consider in arriving at a verdict, as true in whole or in part, any facts related in any statement of Louis B. Saperstein made out of the presence of a defendant.'
>
> Further, 'We, each speaking individually', and then there is a line and under that I have 'did' or 'did not'—'consider such statements of Louis B. Saperstein only'—with the word 'only' underscored—'for the purpose of determination of his state of mind at the time he made the comments.'
>
> * * *
>
> "* * * I want your declaration to assure me that as far as the hearsay statements are concerned you will follow and observe the instructions of the court."

The court then decided to give each juror a separate sheet containing the interrogatories (1892, 1897-1898). Near the end of the court's entire charge to the jury,

His Honor referred back to the interrogatories as follows (1868-1869):

> "Now, ladies and gentlemen of the jury, briefly I am going to refer back to this one form that I have prepared for you to take into the jury room that you are to complete in order to inform me whether or not you permitted any statements of Louis B. Saperstein, including the letter and other statements made out of the presence of the defendants, to enter upon your deliberations with respect to the truth of the assertions. Now, I have twelve names here—I mean twelve lines, for signatures. If it occurs that there is a difference of opinion—I must repeat you are obligated by law to abide by my instructions, but if there is any juror that is hesitant to do so, then only those who subscribe to what is stated here can sign. I hope I don't encounter any such situation."

This is like saying to the jury, "I have asked you to do the impossible; I want you to sign a form which says that you have done the impossible; and I hope that you are not going to tell me you cannot do the impossible." It was unrealistic and coercive. The twelve jurors signed the twelve forms, which the judge received before receiving the verdict (1904). After the trial judge's above-quoted pressure upon the jurors, signing the forms proved nothing.

These twelve identical forms are attached to the verdict and are part of the record of the proceedings in the district court. (For easy reference, a photo copy of one of the twelve forms appears in Appendix A hereto).

There is no provision in the Federal Rules of Criminal Procedure which authorizes the submission to the jury of interrogatories to accompany the general ver-

dict. In *United States* v. *Spock*, supra, the United States Court of Appeals for the First Circuit reversed the conspiracy conviction of Dr. Spock and codefendants on the ground that the trial court, over defense objections, served interrogatories upon the jurors and elicited special verdicts from the jury. Said the court (pp. 181-183 of 416 F.2d):

> "In its exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneously and subsequent.
>
> * * *
>
> "The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly.
>
> * * *
>
> "Nor is it an answer that these questions were labelled special findings and not special verdicts, and that the jury was informed that they were to be answered only if a general verdict of guilty had been reached."

As to the forms served upon the jurors in the case at bar, the trial judge entitled each one, "INTERROGATORY." He then referred to the interrogatories as "statements," but actually they were far worse than interrogatories or statements, because the trial judge made it quite clear, in his instructions and comments, exactly how His Honor expected the jurors to answer the interrogatories, for he said he did not want to "encounter any such situation" where some jurors might be unable to sign them in accordance with his instructions as to the limited use to be made of the Saperstein letter.

The interrogatories are mentioned briefly in the opinion of Judge Aldisert for the original three-judge panel below. The opinion merely states that the trial judge "required the jury to sign a special form" and then goes on to quote part of the "form." But the opinion of the Court *en banc* refers to the "form" as a "pledge." The opinion states: "The judge then requested each juror to sign a pledge that he would consider the letter only to determine Saperstein's state of mind because each side conceded that any consideration of the letter by the jury for the truth of its assertions would be improper."

The opinion of the Court of Appeals *en banc* below does not mention the title "INTERROGATORY" which the trial judge printed on each form in capital letters. The label is unimportant, however, as recognized in the *Spock* case, supra. What is important is that these interrogatories, whether labelled forms, or statements, or pledges, and the trial judge's instructions and comments with regard thereto, were judicial pressure put upon the jurors. The decision of the Court of Appeals for the Third Circuit *en banc* is, therefore, in conflict with the *Spock* case, supra, in the First Circuit.

The combination of the service of interrogatories upon the jurors and the trial court's instructions and comments with regard thereto was improper and coercive, and deprived the petitioner of due process and trial by jury.

A good discussion of verdicts in federal criminal cases appears in 8 Moore's Federal Practice, Par. 31.02 [3] (1972).

The petitioner respectfully submits that the conflict of the decision of the Court of Appeals for the Third

Circuit with the decision of the Court of Appeals for the First Circuit, as well as the importance of the right of the jurors to be let alone so that defendants will not be deprived of due process and a fair trial by an impartial jury, present important questions of constitutional law which should be settled by this Court. At the very least, we respectfully submit, the far departure of the trial judge from the accepted and usual course of judicial proceedings, which is sanctioned in the decision below, calls for an exercise of the Supreme Court's power of supervision. Serving the jurors with interrogatories and requiring the jurors to make a statement, pledge, or otherwise answer for their deliberations must not be allowed to become a matter of common practice in the United States District Courts.

2. THE DECISION BELOW IS SUFFICIENTLY IMPORTANT FOR THE SUPREME COURT TO REVIEW BECAUSE THE DELIBERATE MISCONDUCT OF THE PROSECUTOR, WHICH WAS ALLOWED BY THE TRIAL COURT AND SANCTIONED BY THE DECISION BELOW, HAS RAISED IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

This second reason was the basis for the unanimous decision of the original three-judge panel of the Court of Appeals to reverse the judgment of conviction. It is also comprised within the dissenting opinions of the Circuit Judges Aldisert and Kalodner after the rehearing *en banc*.

Near the end of his opening statement, the United States Attorney, after stating that Saperstein was threatened with death and beaten by the defendants added, "We cannot prove it, not corroborated through Louis Saperstein, because by November 26th he was dead." (164-165).

Counsel for the defendants moved for a mistrial because of the prosecutor's obvious inference that the defendants were responsible for Saperstein's death. The motion was denied (177-178).

The prosecutor knew that an investigation had been conducted into the death of Saperstein by the Essex County Grand Jury, and that the Grand Jury found no cause for action against anyone. Later in the trial, but not in the presence of the jury, the trial judge acknowledged that there was no evidence of murder (1059-1061), and ordered the production of the Essex County Grand Jury minutes for examination by all the attorneys (1232-1235, 1246-1247, 1250, 1273-1274, 1314-1319, 1340).

In order to avoid further discussion of this matter after the opening statement, the death of Saperstein was stipulated (388-390). But the prosecutor then proceeded to defeat the purpose of the stipulation. He used the witness Zelmanowitz to testify as to hearsay threats against Saperstein. (The record shows several oral hearsay statements attributed to Saperstein, which were admitted in evidence (317, 342-343, 344-346, 346-349, 353-355)). He then followed this up by introducing evidence that Saperstein died of acute arsenic poisoning. (This medical evidence was presented through the autopsy report (Government Exhibit G-34) and the testimony of the State Medical Examiner who performed an autopsy on the *exhumed* body of Saperstein (1028-1038, 1226-1227)). The inference left with the jury early in the case was thus further emphasized.

The unwarranted suggestion of murder weighed heavy at the trial, and the trial judge's charge to the

jury (1849-1850), to which an exception was taken (1889), did not relieve the situation.

The petitioner respectfully contends that the prosecutor's conduct should be placed in its proper light which, in the language of the unanimous opinion of the three-judge panel of the Court of Appeals, is simply this:

> "The evidence was designed to divert the jury from its duty to decide the criminal charges before it. The extortion trial was converted into a murder trial."

We are not dealing with an error which was caused by a prosecutor who inadvertently overstepped the lawful bounds. This is a case where the prosecutor carefully planned to prejudice the jury and deliberately carried out his plans. The overwhelmingly prejudicial conduct of the prosecutor is at the core of the issue. The aforementioned record fully supports Judge Aldisert's opinion and the petitioner's contention.

With the prosecutor's motive in mind, as well as the overwhelmingly prejudicial nature of the evidence as to the cause of Saperstein's death, we now turn to the applicable law.

Under our system of law, a defendant is entitled to a new trial, however guilty the court may believe him to be, if error affecting his substantial rights has occurred in any particular. As stated by the Supreme Court in *Bollenbach* v. *United States,* 326 U.S. 607 (1946):

> "it may not be amiss to remind that the question of guilt is not whether guilt be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal

courts. * * * From presuming too often all errors to be 'prejudicial', *the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty.* In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (Emphasis supplied.)

The *Bollenbach* case, supra, involved an equivocal direction to the jury on a basic issue. In the case at bar, the basic nature of the case was changed from a trial for extortionate credit transactions to a trial for murder. The holding in the *Bollenbach* case, supra, is therefore applicable here. The prosecutor's calculated behavior in creating this situation is inexcusable. By allowing the overwhelmingly prejudicial evidence to be admitted over defense objections, the trial judge committed incurable error.

It is difficult, if not impossible, to think of anything more unfair, or that would cause a jury to be more prejudiced against a defendant, than the unjustifiable thought that the defendant was connected with the suggested murder of a prospective witness. The Supreme Court's opinion in *Berger* v. *United States*, 295 U.S. 78 (1935), is particularly applicable here:

"The United States Attorney * * * while he may strike hard blows, he is not at liberty to strike foul ones.

* * *

"Moreover, we have not here a case where the misconduct of the prosecutor was slight or confined

to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

The cases on the conduct of counsel for the prosecution are collected in 23A C.J.S. Crim. Law sec. 1081.

The misconduct of the prosecutor, a quasi-judicial officer, in depriving the petitioner of his constitutional right to a fair trial by an impartial jury, was planned and deliberate and was so recognized in the original opinion of the three-judge panel of the court below. In view of the place of importance that a fair trial by an impartial jury has in our Bill of Rights, the decision of the Court of Appeals *en banc* is sufficiently important for the Supreme Court to review in order to settle this important question of constitutional law and as an exercise of its power of supervision, since the Court of Appeals *en banc* has sanctioned the prosecutor's misconduct in its decision.

3. THE DECISION BELOW IS EXCEPTIONALLY IMPORTANT FOR THE SUPREME COURT TO REVIEW, BECAUSE IT PROVIDES AN OPPORTUNITY FOR THE COURT TO SETTLE IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH CONCERN STANDARDS OF PROPER CONDUCT FOR TRIAL JUDGES AND PROSECUTORS.

Two years ago, the Supreme Court had occasion to consider proper criminal court proceedings with regard to the conduct of a defendant during trial. *Illinois* v. *Allen*, 397 U.S. 337, reh. den. 398 U.S. 915 (1970). The Supreme Court held that it is not error for a trial judge to remove a defendant from his own trial when the defendant's behavior is clearly of such an extreme nature as to justify his removal. The Supreme Court stated: "The flagrant disregard in the courtroom of

elementary standards of proper conduct should not and cannot be tolerated." We agree wholeheartedly with the holding and rationale of that decision.

We now most respectfully urge the Supreme Court to consider the other side of the coin. As pointed out by Mr. Justice Douglas in a concurring opinion in the *Allen* case, supra, in Anglo-American law, great injustices have at times been done by judges, as well as prosecutors.

In the case at bar, the trial judge pressured the jury as shown in the first reason for certiorari, and the prosecutor prejudiced the jury as shown in the second reason for certiorari. Having considered the conduct of a defendant in the *Allen* case, supra, the Supreme Court should consider proper court proceedings with regard to the conduct of the trial judge, the conduct of the prosecutor, and the right of the jury to be let alone, all of which bear upon the petitioner's constitutional right to due process and a fair trial by an impartial jury and upon the constitutional rights of all defendants in all federal criminal cases tried by a judge and jury.

The trial judge and the prosecutor have shown a flagrant disregard of elementary standards of conduct. However, the decision of the Court of Appeals below appears to treat the trial judge's service of interrogatories upon the jury as routine practice, and then, after a lengthy discussion in an attempt to overcome the two strong dissenting opinions, holds that the prosecutor's conduct in presenting proof of Saperstein's death was within the trial judge's discretion.

If, after considering the above reasons, the Supreme Court still has any doubt as to whether this would be an appropriate case for the consideration of proper standards of conduct for trial judges and prosecutors,

we assure the Court that there is much more. Questions concerning the conduct of the trial judge and the prosecutor permeate the entire trial record.

Personal Attacks Upon the Defense Attorneys During the Trial

In addition to the above, the trial judge and the prosecutor conducted personal attacks upon the defense attorneys during the trial, which deprived the petitioner of the effective assistance of counsel, for an attorney cannot devote his full talents in defense of his client when he has to defend himself at the same time. Moreover, a trial judge's hostility toward the defense attorneys can easily be sensed by a jury, to the detriment of the defense attorneys and their clients. As to the treatment of defense counsel by the trial judge and the prosecutor, we respectfully call the Court's attention to the following pages of the trial record: 710-711, 718-737, 901-902, 1459-1462, 1502, 1529-1540, 1540-1542, 1550-1561, 1621-1623. The trial judge was not impartial and his conduct toward the attorneys was humiliating. The prosecutor's conduct toward the attorneys was uncalled for, unprofessional, and slanderous. And there is still more.

The Trial Judge's Release of Transcripts of Electronic Eavesdropping Caused an Avalance of Publicity During the Trial.

Superimposed upon what happened to the petitioner and the attorneys in the courtroom are events which the trial judge caused to happen against the petitioner and the attorneys outside the courtroom. At the beginning of the trial, the trial judge released to the press sensational transcripts of illegal electronic eavesdropping conducted by the Government on alleged criminal conversations from 1961 to 1965, years be-

fore the activities for which the petitioner was indicted. The transcripts consist of more than 2000 pages of recorded conversations and FBI summaries of such conversations. Counsel for the petitioner objected to making the transcripts available to the public and forewarned the judge of the tremendous amount of publicity that could be expected, but the judge released the transcripts over counsel's objection. The anticipated avalanche of unfavorable publicity followed.

Conversations attributed to the petitioner DeCarlo were in the transcripts, and DeCarlo's name was repeated over and over again. The names of two attorneys for the defense were also in the transcripts of the conversations. Not only did the local newspapers, The Newark Evening News and The Newark Star-Ledger, carry front page stories and other stories *throughout* the trial (on the electronic eavesdropping as well as the trial itself), but The New York Times gave the transcripts of electronic eavesdropping unprecedented coverage. The prejudicial publicity saturated the community. (A summary of the prejudicial publicity contained in the three abovementioned newspapers *during the trial* appears in Appendix F hereto).

It is no answer to such judicial misconduct to argue that the jury was sequestered. Defense counsel do not have the burden of proving a clear nexus between community feeling and jury feeling. The Supreme Court cases are collected in *Pamplin* v. *Mason*, 364 F.2d 1 (5th Cir., 1966), and we cite the *Pamplin* case, supra, because the analysis in that opinion is applicable to the case at bar. As to the trial judge's release of the transcripts of electronic eavesdropping, we respectfully call the Court's attention to the following pages of

the trial record: 632-634, 448-457, 1075-1079, 244-245, 1150-1162, 1951-1957; Hearing on Motions, 6-8, 215-242.

A trial judge has the responsibility to make the courtroom a place of quiet dignity. He must not pressure the jury, and he must not conduct personal attacks upon the attorneys for the defense. Due process also demands that a trial judge shall refrain from stirring up public sentiment against an accused and his attorneys outside the courtroom. In the case at bar, the trial judge failed to fulfill his responsibilities.

A prosecutor, a quasi-judicial officer, has similar responsibilities. He must not deliberately divert the jury from its duty to decide the criminal charges before it and he must not, during the trial, conduct personal attacks upon the attorneys for the defense. In the case at bar, the prosecutor has also failed to fulfill his responsibilities.

For this third reason, therefore, the decision of the Court of Appeals *en banc* is exceptionally important for the Supreme Court to Review.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

MICHAEL P. DIRENZO
15 Columbus Circle
New York, N. Y. 10023

MORDECAI M. MERKER
7206 Regent Drive
Alexandria, Va. 22307

Counsel for Petitioner